IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Civil Revision No. 61 of 2001.

Judgment reserved on May 29, 2007.

Date of decision June 1, 2007.

Himachal Fruit Growers Ltd. ….Petitioner.

Versus

M/S KSC Delhi and another ….Respondents.

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1]

For the Petitioners: Mr. Bimal Gupta, Advocate.

For Respondent No. 2 Mr. N.K.Sood, Advocate.

Dev Darshan Sud, J.

Petitioner- claimant filed an application under Order 9 Rule 4 of the Code of Civil Procedure before the learned trial Court praying that the order of dismissal passed on 4.1.1995 in an application under Section 8 of the Arbitration Act, 1940 (for short 'the Act') for appointment of an arbitrator be set aside. The application was contested on a number of grounds,

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[1] ***Whether reports of Local Papers may be allowed to see the judgment?***

including limitation. The learned trial Court framed four issues and after trial held against the applicant, holding that the application under Section 8 of the Act was dismissed on 4.1.1995 on account of non appearance on behalf of the claimant – applicant, and the application for restoration should have been moved within 30 days from the date of dismissal under Article 122 of the Limitation Act. The application for restoration was filed on 19.6.1995 and, therefore, was barred by time. The learned trial Court concluded as a fact that there was no reasonable ground for condoning delay in moving the application under Order 9 Rule 5 of the Code of Civil Procedure. On the ground of maintainability, the learned trial Court concluded that the application was moved by learned counsel for the applicant-claimant and it was not accompanied by power of attorney which according to the learned Court ceased to have effect after the dismissal of the case and, therefore, also the application was not maintainable. An appeal against this order was preferred in the Court of the learned District Judge who by the impugned judgment, reversed the findings on the point of authority of counsel to represent the petitioner placing

reliance on a decision of the Hon'ble Supreme Court in Ananta Pandu Porobo Desai and others vs. Smt. Lalita Poi (1978) 2 Supreme Court Cases 681; on the point of limitation for filing an application under Order 9 Rule 4, the learned District Judge has held that the application was supported by the affidavit of the counsel for the appellant in which it was stated that his wife was admitted in a hospital for prolonged medical treatment from January to May, 1995 and ultimately expired on 11.5.1995. In these circumstances, the counsel found it difficult to attend to Court matters. According to the learned District Judge this portion of the pleading and evidence of the parties deals only with the inability of the counsel to conduct the matter and is not the explanation with respect to inability of the appellant to move within time. On the evidence before the learned Court below, it was held that since one of the officials of the appellant was present on the date of hearing, there was a presumption that he was aware of the order. As such, the delay was not bonafide. The learned appellate Court further held that the appellant could have independently filed the application for restoration of the case.

I am not in agreement with the reasoning of the learned Courts below. To say the least, the learned trial Court has not at all applied its mind to the facts of the case. The learned appellate Court has also not considered the case in its true perspective. Surely, if the appellant was to move within time, it had to do so through the counsel who was representing them. On delay, the affidavit of the counsel was filed which was not disbelieved. In these circumstances, there was no ground for holding that the application was barred by time.

The interest of justice will be met in case the present revision petition is allowed. The judgment of both the Courts below is set aside and the respondent compensated with costs amounting to Rs.7,000/-. The matter is remanded to the learned trial Court for decision in accordance with law on the application under Section 8 of the Act which was filed and dismissed in default. The parties will appear before the learned trial Court on 3.7.2007, on which date the costs shall

be paid to the respondents. The matter shall be decided on merits by the learned Court below.

June 1, 2007. (PC). (Dev Darshan Sud), J.